

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>MORN VILAYSING</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 210,878
<b>IBP, INC.</b>	)	
Respondent	)	
Self-Insured	)	

**ORDER**

Claimant appealed the order entered by Administrative Law Judge Kenneth S. Johnson on November 13, 1996, which assessed costs in the amount of \$1,081 and court reporter fees against the claimant and in favor of the respondent. Appeals Board member Gary M. Korte has recused himself from this proceeding and Jeff K. Cooper has been appointed Appeals Board member pro tem to serve in his place. The Appeals Board heard oral argument by telephone conference on April 15, 1997.

**APPEARANCES**

The claimant appeared by her attorney, Gary E. Patterson of Wichita, Kansas. The respondent, a qualified self-insured, appeared by its attorney, Craig A. Posson of Dakota City, Nebraska. There were no other appearances.

**RECORD**

The record consists of a transcript of proceedings before the Honorable Kenneth S. Johnson, Administrative Law Judge for the Division of Workers Compensation, State of Kansas, at Garden City, Finney County, Kansas, on the 13th of November, 1996, together with the case file as maintained by the Division of Workers Compensation.

**ISSUES**

Respondent, in its brief filed before the Appeals Board, raised the following issue:

- (1) Whether the Appeals Board has jurisdiction to review the order of the Administrative Law Judge.

Claimant requests Appeals Board review of the following issue:

- (2) Whether the Administrative Law Judge exceeded his jurisdiction in assessing the costs against the claimant.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

- (1) Before the Appeals Board discusses the merits of respondent's jurisdictional argument, the Appeals Board finds it is necessary to give a brief summary of the facts leading to the Administrative Law Judge's order. As required by K.S.A. 1996 Supp. 44-534a, claimant served respondent on August 19, 1996, with a notice of intent letter dated August 14, 1996. The letter demanded that respondent provide claimant with physical therapy treatment as recommended by Pedro A. Murati, M.D. Respondent declined to provide the requested physical therapy treatment and claimant subsequently filed on September 30, 1996, an Application for Preliminary Hearing requesting the Administrative Law Judge to order the physical therapy treatment.

The preliminary hearing was scheduled to be held before Administrative Law Judge Kenneth S. Johnson in Garden City, Kansas, on November 13, 1996. It is the Appeals Board's understanding from the transcript of the proceedings and the briefs of the parties that this preliminary hearing was one of a number of cases on the November 13, 1996, docket to be heard by the Administrative Law Judge. Before the docket started at 9 a.m., the Administrative Law Judge received a telephone call from respondent's attorney notifying the Administrative Law Judge that he would be some one-and-a-half hours late due to bad weather. Respondent's attorney was traveling by company airplane from respondent's corporate headquarters located in Dakota City, Nebraska, to Garden City, Kansas.

Claimant and her attorney were present at the start of the docket and were notified that respondent's attorney would be late. After waiting for over an hour, claimant decided to cancel the preliminary hearing and relinquish her request for physical therapy treatment. Her attorney notified the Administrative Law Judge of claimant's decision and both he and the claimant left the court room.

Respondent's attorney finally arrived at approximately 10:30 a.m. He sat through the docket call and was notified at the completion of the docket by the Administrative Law Judge that claimant had canceled the preliminary hearing and withdrew her request for preliminary hearing benefits. At that time, respondent's attorney requested that certain costs be assessed against the claimant. Respondent's attorney argued he would not have made the trip to Garden City, Kansas, if he had been notified that claimant had canceled the preliminary hearing and had withdrawn her request for preliminary hearing benefits.

In the transcript of the November 13, 1996, proceedings which immediately followed respondent's request for assessment of costs, the Administrative Law Judge noted respondent also had scheduled a settlement hearing in Garden City on November 13, 1996, which he did attend. However, the Administrative Law Judge further stated respondent's attorney indicated he would have moved the settlement hearing to another day if he would have known this preliminary hearing was canceled.

The Administrative Law Judge, with only the respondent's attorney present and without notice to claimant, found that because respondent's attorney was not informed by the claimant that she was going to cancel the preliminary hearing and withdraw her request for physical therapy treatment, respondent incurred unnecessary expenses traveling from Dakota City to Garden City to attend the hearing docket. Therefore, the Administrative Law Judge assessed costs for the equivalent of a round-trip airline ticket in the amount of \$281 and attorney fees for eight hours of work at \$100 per hour or \$800 for total costs of \$1,081 plus court reporter fees.

The first argument the respondent presents to the Appeals Board is the Appeals Board lacks jurisdiction to review the Administrative Law Judge's order because the order was the result of a preliminary hearing held pursuant to K.S.A. 1996 Supp. 44-534a. Therefore, the respondent contends the Appeals Board's jurisdiction is limited to review only if one of the jurisdictional issues listed in the preliminary hearing statute is raised. The Appeals Board disagrees with respondent's argument. The Appeals Board finds the Administrative Law Judge's order that is the subject of this appeal is not a preliminary hearing order as contemplated by K.S.A. 1996 Supp. 44-534a. The preliminary hearing statute only grants the Administrative Law Judge authority to make an award of medical and temporary total disability compensation pending a full hearing on the claim. The Appeals Board finds that the assessment of costs against the claimant was not one of these limited preliminary hearing benefits.

The Appeals Board finds that the Administrative Law Judge entertained ex parte argument from the respondent concerning the subject of assessment of costs against the claimant. The Appeals Board concludes such order is subject to de novo review by the Appeals Board as it is an act of the Administrative Law Judge not made pursuant to the preliminary hearing statute. See K.S.A. 1996 Supp. 44-551(b)(1) and Shain v. Boeing Military Airplanes, 22 Kan. App. 2d 913, 916, 924 P.2d 1280 (1996).

(2) The claimant argues that the Administrative Law Judge was without jurisdiction to enter the subject order because claimant did not have notice of the hearing and, thus did not have an opportunity to be heard. For these reasons, the claimant argues her procedural due process rights were violated and the resulting order is null and void.

The Appeals Board agrees with claimant's argument that her procedural due process rights were violated. The transcript of the proceedings indicates the Administrative Law Judge held a hearing on the issue of whether costs should be assessed against the claimant with only respondent present. Claimant was not given notice of such hearing and, therefore was not present to present evidence or arguments. The Appeals Board concludes the Administrative Law Judge violated the basic elements of procedural due process as he failed to give claimant notice of the hearing which deprived the claimant of an opportunity to be heard at a meaningful time in a meaningful manner. See Peck v. University Residence Committee of Kansas State Univ., 248 Kan. 450, 467, 807 P.2d 652 (1991). Therefore, the Appeals Board finds the Administrative Law Judge's order that is contained in the transcript of proceedings held in this matter on November 13, 1996, that assessed certain costs against the claimant and in favor of the respondent is found to be null and void.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the order by Administrative Law Judge Kenneth S. Johnson on November 13, 1996, which assessed certain costs against the claimant and in favor of the respondent should be, and is hereby, set aside as null and void.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June 1997.

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BOARD MEMBER PRO TEM

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BOARD MEMBER

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BOARD MEMBER

c: Gary E. Patterson, Wichita, KS  
Craig A. Posson, Dakota City, NE  
Kenneth S. Johnson, Administrative Law Judge  
Philip S. Harness, Director